

The Human Right to Land

A Case of Too Many Rights Spoiling the Broth or a Recipe for Justice?

ROBIN RAMSAHYE — 2 November, 2016



Land rights are not typically perceived to be a human rights issue“, as legal scholar Jeremie Gilbert observes. This is surprising, given the vital importance of land, a finite resource, for a variety of human rights. These include access to life-sustaining resources, such as food and water, as well as other means to ensure an adequate standard of living (as codified in Art. 11 International Covenant on Economic, Social and Cultural Rights, ICESCR), which hundreds of millions of people all over the globe are lacking, both in rural and urban contexts.

All too often, quarrels about land are drivers of conflict, leading to forced displacement during hostilities and

subsequent questions of land redistribution in post-conflict settings. Discrimination of underprivileged groups often includes barring them from accessing land. Structural inequality in land distribution is widening the gap between the well-off and the rural and urban poor, such as smallholder farmers, slum dwellers and other disadvantaged groups, e.g. indigenous peoples. Consequently, land policies concern large tracts of the global populace and tend to serve as a laboratory for social change. I argue that sustained research to conceptualize a human right to land could boost the standing of land rights on the international level and in the long term improve state protection of vulnerable populations.

Land Rights on the International Plane

Despite its increasingly transnational importance, land policies are still mostly regulated within complex domestic legal frameworks. However, a large number of vulnerable groups depending on land remain only marginally protected by the law. Consider the Rights and Resources Initiative's September 2015 Global Baseline report. It finds staggering discrepancies between the amounts of global land factually held as indigenous and community lands (65%) and the percentage of such land ownership legally recognized by states (18%).

Could international human rights Law in the form of a right to land help to put human rights related land rights on a more solid footing? When contemplating this question, one cannot but concede that currently "a right to land is absent from all international human rights instruments" (see here). However, recent developments seem to indicate that the importance of land rights on the international plane is

steadily growing. Several legal instruments on indigenous peoples' rights and a number of (soft law) documents on specific land-related issues have been developed. The ESCR Committee has consistently referred to land rights as indispensable in fulfilling many recognized socio-economic rights. International tribunals, such as the Inter-American Court of Human Rights, and influential domestic courts have also ruled on land rights, often by means of creative interpretation of treaties and constitutions (see here for a critical summary of the Inter-American Court's treatment of indigenous land rights).

The Future of a Human Right to Land

Considering these developments, it does not appear far-fetched to reflect on the form and practicality of an international human right to land. Contemplating the recognition of such a right poses several complex questions that deserve further research. In a first step, it is important to trace how the right to land should be framed doctrinally, given its current absence from human rights law treaties. Does it serve an original purpose and can it be readily incorporated into the current human rights framework without "spoiling the broth"?

As a second step, one should identify rights bearers and determine whether the right to land is an apt means to protect the rights of the enormous range of individuals and groups depending on land for their livelihoods, as property or as a pillar of their cultural and social identity. One must in a third step pronounce upon which specific rights the human right to land encompasses. The vastly different circumstances in which land rights are of importance make

this a complex endeavor and are the reason for the right to land's peculiar nature.

The variety of legal layers governing land in various states and regions exemplifies the multiplicity of options available to construct legally sound land rights frameworks. They include statutory laws, laws of custom, often based on ancient community rules, as well as religious laws, such as Sharia law. The resulting legal frameworks are also a result of lawmakers' decisions to follow particular streams of social and economic land policies. For example, opinions on the efficacy of formalizing land rights to lift large population swathes from poverty currently diverge (see [here](#) and [here](#)). The right to land's unclear ambit and a lack of comprehensive studies on its legal nature leave ample room for scholarly creativity and discussion: the right may have to incorporate legal approaches from different existing land frameworks and try to reconcile formal and customary land law in a comprehensive system.

A doctrinally coherent and feasibly implementable right to land must be well grounded in the established human rights law framework and factor in interdisciplinary economic, political and social aspects of land policies to attain the highest level of human rights protection while remaining practically implementable for states. It will over time be interesting to examine whether and how a human right to land could in practice influence states to adopt policies geared towards improving the lot of vulnerable populations who depend on land.

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